NO. 56536-6-II

COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

ELIZABETH BARTLETT, APPELLANT

v.

ESTATE OF ROBERT PARMAN, RESPONDENT

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Estate repeats the concept of *reframing, shifting arguments*, and similar phrases, e.g., referring to Elizabeth's "shift[ing] gears by reframing her claim" (RB 2); offering a "reframed argument" (RB 20); "reframe[ing] things again (RB 21); and further at RB 29; RB 46; RB 48; RB 54; RB 58; and RB 60. The repetition of conclusory verbiage does not add any weight or strength to the Estate's argument. It is also like the pot calling the kettle black.

Of course, emphasizing different claims or different aspects of a claim at different times is not equivalent to "reframing." Even if the Estate's repetitive argument had merit, "[a] party may . . . state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both." CR 8(e)(2); *Dilley v. S & R Holdings, LLC*, 137 Wn. App. 774, ¶ 13, 154 P.3d 955 (2007).

II. ARGUMENT IN REPLY

A. The Two-Year Nonclaim Statute Does Not Apply to the Facts of This Case (RB 22-25).

The Estate argues that it is hornbook law that claims against a

decedent cannot be brought more than two years after death. RB 20. "That is not debatable." *Id*.; RB 46. This is a "bright-line rule with no room for interpretation, enlargement, or waiver." RB 1. However, the Estate concedes that there are situations in which the statute "does not apply." RB 51. And the application of equitable principles is available in some cases. RCW 11.40.070(4). The reality is that there are many exceptions to the nonclaim statute.

There are at least three such exceptions which are applicable here: (1) Elizabeth has brought a *claim* against specific property (the Renata Lane property) based on unjust enrichment through the *remedy* of a constructive trust or an equitable lien secured by a lis pendens; (2) Elizabeth is a secured creditor, or certainly the functional equivalent of a secured creditor; and (3) Elizabeth's claim against Robert's Estate arose long after his death in 2005. AB 51-52.

The Estate tries to cabin Elizabeth's claim as a claim against the decedent under RCW 11.40.010. RB 24. However, the creditor's claim filed alleges that "Claimant asserts a claim of unjust enrichment and an equitable lien on the property located at 6414 Renata Lane SW,

Olympia, WA 98512." CP 273.

The complaint alleges an alternative claim of unjust enrichment based on "inducing plaintiff to convey the [Renata Lane] land to Ruth and Bob Parman and to spend substantial sums of plaintiff's money and expend plaintiff's work effort to improve the subject property." CP 8, ¶ 5.2. Supportive facts are alleged in ¶ 2.6 of the complaint. CP 6-7. Plaintiff sought relief in the form of "[a]n equitable lien or constructive trust to protect her interest in the Renata Lane property." Complaint, ¶ 5.4; §VI, ¶3.[1]

These assertions are sufficient to constitute a claim not against the general assets of the Estate but against *specific property*, which is an exception to the two-year non-claim statute, or, in the words of the Estate, one of those situations where it [the statute] "does not apply."

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[1] The superior court ignored this claim and construed the complaint as raising claims that Robert "breached a joint venture or partnership agreement" which the court considered to be a claim against the decedent. VRP (Oct. 22, 2021) 22. Given its ruling, the court specifically did not reach defenses "regarding bankruptcy and dissolution positions that somehow estop this claim from going forward" and arguments regarding will contract and associated issues. *Id.* at 23.

RB 51; AB 20-23.

B. A Claim Against *Specific Property* Does Not Require Ownership; Elizabeth's Claim Was Pleaded Against Specific Property (RB 25-27).

"RCW 11.40.010 applies only where the claim is a general charge against the assets of the estate. It does not apply where the claim is for specific property in the estate." *O'Steen v. Wineberg's Estate,* 30 Wn. App. 923, 934, 640 P.2d 28, *review denied,* 97 Wn.2d 1016 (1982). Elizabeth's claim in the instant case is not a general charge against Robert's Estate, but a claim of lien against specific property, i.e., the Renata Lane property.

The Estate's response does not address this crucial issue. The Estate argues numerous times that Elizabeth's argument fails "because she does not have an *ownership* interest in the Renata Lane property." RB at 27, and repeated at RB 20, 25, 31, 46, 47, 48, 54, 56, 58, 60, and 62. This assertion is made without explaining or considering what an *ownership* interest is, or whether such an interest is required in order to assert a *claim for specific property* beyond the reach of RCW 11.40.010.

It has been held that "[a]n equitable lien represents a direct ownership interest." *Cruz v. United States*, 219 F. Supp.2d 1027 (N.D.Cal. 2002) (equitable lien gives standing for conversion claim). Elizabeth asserts that seeking a constructive trust or equitable lien on the Renata Lane property, further secured by a notice of lis pendens, constitutes a *claim for specific property*. CP 136-38.

Similarly, one claiming an equitable lien on specific property is claiming an interest in that property, i.e., the right to sell the property to satisfy the underlying claim. An *equitable lien* can be defined as a "right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property." Lien, *Black's Law Dictionary* (9th ed. 2009).

Thus, an equitable claim of an interest in real and personal property is not a "claim against the decedent" within the meaning of RCW 11.40.010. *Witt v. Young,* 168 Wn. App. 211, 222, 275 P.3d 1218, *review denied*, 175 Wn.2d 1026, 291 P.3d 254 (2012) (claim of an interest in "all personal and real property" acquired during relationship with defendant was "not a generalized claim of

indebtedness" and thus no requirement to comply with nonclaim statute). Elizabeth claims such an interest in the Renata Lane property on the basis of unjust enrichment and entitlement to a constructive trust and equitable lien, secured by a lis pendens.

In addition, the concept of property *ownership* consists of more than a mere label. In *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 367, 13 P.3d 183, 193 (2000), *abrogated on other grnd's*, *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019) the Washington Supreme Court held that the concept of ownership of real property could be compared to a "'bundle of sticks,' which the *owner* enjoys as a vested incident of ownership," each stick representing a right the *owner* of the property could exercise. [Footnote omitted.] *Manufactured Housing,* 142 Wn.2d 347, 367. "[T]he right of property [ownership] includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer . . . to other persons; [and] (4) right of transmission . . ." *Id.*

The right a lienholder has in the property subject to the lien is the right to have the property sold to satisfy the obligation secured by the lien. See, e.g., RCW 60.04.071 (mechanics lien); RCW 60.08.040 (chattel lien); RCW 4.56.190 (judgment lien). This right restricts one of the sticks in the bundle of rights possessed by the owner of the property.

As to the constructive trust issue, "A constructive trust is an equitable remedy which arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it." *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001) (citing *Baker v. Leonard*, 120 Wn.2d 538, 547-58, 843 P.2d 1050 (1993)). Thus, the beneficiary of a constructive trust thereby obtains title to the property.

In *Olsen v. Roberts,* 42 Wn.2d 862, 865, 259 P.2d 418 (1953) the supreme court held that where "the recovery of specific property is sought on the ground that such property is *impressed with a trust for the benefit of the person claiming it*," the matter is not one of "claimed

indebtedness but of an assertion that the particular property is no part of the general assets of the estate." [Italics added.] *Olsen,* 42 Wn.2d at 865; AB 22. The *Olsen* court concluded that such a claim for a constructive trust was not within the purview of the nonclaim statute. *Id.*

Moreover, a claim for specific performance follows the same rationale. *Porter v. Boisso*, 188 Wn. App. 286, 293, 296-297, 354 P.3d 892, *review denied*, 184 Wn.2d 1022 (2015) (claim for specific performance was not a claim against a decedent within the meaning of the nonclaim statute). The Estate agrees that a claim for specific performance "is not within the purview of RCW 11.40.010, citing *Baird v. Knutzen*, 49 Wn.2d at 310. "[2] RB 29; AB 24-25. If specific performance is an equitable remedy not within the purview of the nonclaim statute, then an equivalent remedy—constructive trust—must also not be within the purview of the nonclaim statute. *See*, *Olsen*, 42 Wn.2d at 865.

[2] *Baird v. Knutzen*, 49 Wn.2d 308, 301 P.2d 375 (1956).

Accordingly, Elizabeth is claiming, as the first exception to the nonclaim statute, one of the rights of property ownership based on an equitable lien, a claim for a constructive trust and the power of the notice of lis pendens she filed to preclude, as a practical matter, the unconditional sale or transfer of the Renata Lane property.[3] The nonclaim statute does not apply to such a claim. An argument to such effect is at least debatable and is not unreasonable.

C. Elizabeth Is a Secured Creditor (RB 27-28).

The Estate claims that Elizabeth's argument that she is a secured creditor, the second exception to the nonclaim statute, "conflates a claim with a remedy." RB 27. However, a cause of action may also be a remedy. "Restitution," for example, has been described as both a cause of action and a remedy. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011).

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[3] The lis pendens itself was filed in the companion case, and Judge Price denied the Estate's motion to cancel it. CP 405-406. The Estate does not argue that Elizabeth would receive a greater benefit by filing an additional notice of lis pendens in the instant action. Trial in the companion lawsuit was continued to November 14, 2022, at the request of the respondents' attorneys.

The sole cited legal basis for the Estate's statement is Scott J. Horenstein, 19 WASH PRAC., FAM & COMMUNITY PROP. L. § 11:30 (2nd ed. 2015) as follows:

> It has been said, "An equitable lien is the *right* to have *property subjected in a court of equity to the payment of a claim*." An equitable lien is neither a debt nor a right in property; rather, it is a remedy for a debt."
>
> The equitable lien, when imposed, is *collateral for a debt* . . . This debt is referred to as the "right of reimbursement." If one has a right of reimbursement, the right may be *secured* by an equitable lien.

[Italics added.] Horenstein, § 11:30; RB 28.

Horenstein here uses the language of a secured creditor when referring to an equitable lien: the right to have *property subjected to the payment of a claim*; *collateral* for a debt; the right of reimbursement *secured* by an equitable lien. "The equitable lien acts to secure those payments which may become due and owing in the future . . . " *Northern Commercial Co. v. E.J. Hermann Co., Inc.*, 22 Wn. App. 963, 968, 593 P.2d 1332 (1979). In fact, a *lien* is a "legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied." Lien, *Black's*

Law Dictionary (9th ed. 2009). An equitable lien serves the same function and is similarly an interest in property.

This point is emphasized in *Monegan v. Pacific Nat. Bank of Washington*, 16 Wn. App. 280, 287-88, 556 P.2d 226 (1976), quoting *Nelson v. Nelson Neal Lumber Co.*, 171 Wash. 55, 61, 17 P.2d 626, 628 (1932) where the court refers to a treatise stating than an equitable lien "is simply a right of a special nature over the property which constitutes an incumbrance thereon" so that the property may be sold to satisfy the claim of the creditor. See, App. A for the full quotation. *See also*, *Kelsey v. Kelsey*, 179 Wn. App. 360, ¶ 22-23, 317 P.3d 1096, 1101 (2014) (court could exercise its equitable powers to impose a lien).

The right of a *special nature* over property which constitutes a charge or *encumbrance* thereon so as to be able to sell the property and apply the proceeds to satisfy a creditor's claim is precisely what a secured creditor has.

The notice of lis pendens Elizabeth filed regarding the Renata Lane property acts as further security for her claim. *See*, *Morton v. Le*

Blank, 125 Wash. 191, 196-197, 199, 215 Pac. 528 (1923). AB 53. The Estate does not respond to *Morton* or RCW 4.28.320, upon which the notice of lis pendens is based.

In the instant case, a statute provides that a secured creditor does not come within the purview of the nonclaim statute. RCW 11.40.135. App. B. Under this statute, "the creditor may foreclose on its collateral without filing a claim and engaging in the estate administration process." *In re Estate of Patton*, 1 Wn. App.2d 342, ¶ 18, 405 P.3d 205, 209 (2017).

Elizabeth's status is functionally equivalent to that of a secured creditor, contingent upon her prevailing on her claims. She would then have right to have the Renata Lane property sold in the same way a secured creditor could have the property sold to pay a claim. *Monegan, supra*, 16 Wn. App. 280, 287-88; *Sorenson v. Pyeatt*, 158 Wn.2d 523, ¶ 9 n. 9, 146 P.3d 1172 (2006) (An equitable lien "will be enforced in equity against specific property, though there is no valid lien at law; equity imposes liens either to carry out the intention of the parties to give a security or to prevent injustice, regardless of the intent.").

Elizabeth is thus a secured creditor, or certainly the functional equivalent of a secured creditor, under RCW 11.40.135. Appendix B.

The Estate acknowledges Elizabeth's argument about RCW 11.40.135 but does not respond to it. RB 16.

The Estate mentions Elizabeth's and Shawn's bankruptcy filing back in 2001, but that does not preclude the current assertion of an interest in the Renata Lane property. RB 9, 15. *Arp v. Riley*, 192 Wn. App. 85, 92-93, 366 P.3d 946 (2015), *review denied*, 185 Wn.2d 1031, 377 P.3d 722 (2016) ("party's nondisclosure of a claim in bankruptcy does not automatically lead to estoppel in a future suit").

The bottom line is that the combination of (1) a claim for unjust enrichment, (2) the remedy of a constructive trust, (3) a claim for an equitable lien and (4) the protection of a filed notice of lis pendens is functionally equivalent to a secured claim against the Renata Lane property. Elizabeth should therefore be treated as a secured creditor under the principle that a secured creditor need not file a claim within the two-year period of the nonclaim statute. RCW 11.40.135.

D. Claims Arising After Death Do Not Come Within the Nonclaim Statute.

Elizabeth's claim against Robert's Estate arose long after his death in 2005. AB 51-52. Claims arising after death do not come within the nonclaim statute. *Runkle v. Bank of California*, 26 Wn. App. 769, 773, 614 P.2d 226, *review denied*, 94 Wn.2d 1018 (1980).

E. Robert Did Not Breach Any Promise to Convey the Renata Lane Property to Elizabeth (RB 29-32).

Robert Parman fully complied with his promises to leave the Renata Lane property to Elizabeth. In his will dated October 6, 2004, he left the Renata Lane property to his wife if she survived him, but 50% to Elizabeth if Ruth did not so survive him. CP 628; CP 895. Ruth had a parallel will which left the Renata Lane property to Elizabeth upon the death of the last to die of Robert and Ruth. CP 624.

The Estate fails to specify exactly what viable claim Elizabeth could have brought against Robert within the two-year period following his death in February 2005. Any claim would have been completely speculative, as Ruth did not change her will until 2017, and so Elizabeth incurred no damage through 2007.

F. The Estate's Estoppel Argument is Irrelevant. (RB 32-34).

The Estate did not move for summary judgment on plaintiff's estoppel claim. CP 356-369. The superior court did not reach any issue involving estoppel and decided the case solely on the basis of the nonclaim statute. VRP (Oct. 22, 2021) 22-23. Plaintiff's estoppel claim is therefore irrelevant to any issue involved in this appeal.

G. The Trial Court's Order Striking and Sealing the Will of Robert Parman Should be Disregarded as Violating RAP 7.2(e) (RB 35-36 and Supp. to RB).

The Estate's objections to the will of Robert Parman are part of a complete sideshow, in which the Estate's counsel outrageously accused appellant's counsel of criminal conduct on January 7, 2022 after Elizabeth filed her notice of appeal in this case on December 20, 2021. CP 714; CP 759.

The history of the case is telling. The superior court entered its order dismissing Elizabeth's claims in this action on October 22, 2021, based solely on the two-year or three-year statute of limitations. VRP (Oct. 22, 2021) at 23; CP 510-511. Elizabeth filed a motion for reconsideration, relying on *Runkle v. Bank of California*, 26 Wn. App.

769, 773, and *Foley v. Smith*, 14 Wn. App. 285, 539 P.2d 874 (1975). CP 577-578. Elizabeth also filed a declaration dated November 16, 2021, in support of that motion. CP 617. That declaration contained a copy of the wills of Robert Parman and Ruth Parman from 2004 and Ruth's new will dated September 25, 2017. CP 624-635.

The superior court denied Elizabeth's motion for reconsideration on November 22, 2021. CP 665-666. The order expressly stated that it considered the Declaration of Elizabeth Bartlett in making its ruling. CP 665, ¶ 4).

An order and judgment for fees and costs were entered on December 17, 2021. CP 709-712. On December 20, 2021, Elizabeth filed a notice of appeal of the judgment (CP 714) and a notice of cash supersedeas (CP 726). Normally this would be the end of the case in superior court. *Burton v. Clark County*, 91 Wn. App. 505, 513 n. 9, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015 (1999).

The Estate waited until January 10, 2022, to file a motion to strike a portion of the Declaration of Elizabeth Parman submitted seven weeks earlier and dated November 16, 2021, and to seal Robert's

2004 will. CP 750-759. The motion was based upon perjured declarations the Estate's counsel was delighted to procure from Penny Rohr (CP 771-775) and Samuel Wilkens (776-777), the receptionist and young attorney, respectively, at the Rayan law firm, which was the apparent custodian of Robert's will. CP 803-804.[4] Elizabeth filed a response to the Estate's motion. CP 787-805. The court ultimately struck and sealed the will of Robert Parman in the instant case on March 4, 2022. CP 841-845.

This order was invalid. RAP 7.2(e) provides that if the trial court determination or a post-judgment motion "will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e). Respondent's counsel was aware of this rule, as he mentioned it in oral argument to the superior court that "the

[4] Rohr and Wilkens had a strong motivation to perjure themselves in order to justify releasing the will of Robert Parman in apparent violation of RPC 1.6, which the court found (VRP (January 28, 2022) at 34), and in the face of undoubted express or implied threats from the Estate's attorneys to take legal action against the Rayan law firm.

Court of Appeals certainly would have the benefit of" Robert's will. VRP (January 28, 2022) at 28-30.

If the superior court modifies a decision under review without obtaining permission from the appellate court, the appellate court will vacate or disregard the improper order. *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999) (vacation of trial court's order); *State v. Pruitt*, 145 Wn. App. 784, 793-94, 801, 187 P.3d 326 (2008) (vacation of trial court's findings of fact and conclusions of law); *State v. Moro*, 117 Wn. App. 913, 924-25, 73 P.3d 1029 (2003) (disregard of trial court order); *State v. Friedlund*, 182 Wn.2d 388, 395-96, 341 P.3d 280 (2015) (violation of RAP 7.2(e)).

Based on such authority, this court should disregard the trial court's order striking and sealing the will of Robert Parman for purposes of this appeal. CP 841-844. The Estate sought no permission to obtain such an order under RAP 7.2(e), and the Estate is now seeking to use such order to change or modify the decision being reviewed by this court in this case by arguing that Robert's will, which was submitted to the superior court and considered by the superior

court, should be disregarded.[5]

Elizabeth would like to point out: (1) although the superior court ruled that Young obtained a copy of the will in a way that was not "lawful" (CP 843, ¶ 12), neither the Estate nor the court ever stated specifically which "law" was violated; and (2) the court acknowledged that it was not making any credibility determination regarding the dueling Young and Wilkens declarations. *Id.*

Elizabeth's counsel has no need to further respond to

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[5] Specifically, the Estate is attempting to argue, based on the post-appeal decision of the trial court entered on March 4, 2022 (CP 844), that this court should not consider the will of Robert Parman, because it was "obtained illegally" and "it is not in the record" because it was stricken and sealed by the trial court after Elizabeth filed her notice of appeal on December 20, 2022. Supp. to RB at 4. No legal authority is set forth supporting such argument. Even if appellant's counsel had improperly obtained a copy of Robert Parman's will, that would not make the will automatically inadmissible at trial. See, *McDaniel v. Seattle*, 65 Wn. App. 360, 366, 828 P.2d 81 (1992), *review denied*, 120 Wn.2d 1020 (1993) ("policy considerations dictate against extending the exclusionary rule to civil suits that are not quasi-criminal in nature and that do not seek to exact a penalty or forfeiture"); *Ramirez v. United States*, 93 F. Supp.3d 1207, 1229-31 (W.D. Wash. 2015) ("Because the deterrent effect of applying the exclusionary rule in civil cases is minimal and its cost is significant, as a general rule, evidence obtained in an unlawful manner will not be excluded from civil proceedings."). [Citations and quotation marks omitted.]

respondent's sideshow, as her counsel's response is set forth in his opposition to the motion to strike and seal and his accompanying declaration. CP 803-805; CP 859-860, ¶ 12.

H. Elizabeth's Unjust Enrichment Claim is Not Time Barred (RB 36-43).

The superior court never reached the issue of the Estate's argument that Elizabeth's unjust enrichment claim was time barred. VRP (Oct. 22, 2021) 23. The Estate's re-urging that defense as an alternate ground for affirming the superior court's dismissal of Elizabeth's case is without merit. RB 37.

The statute of limitations on an unjust enrichment claim is three years. RCW 4.16.080(3); *In re Gilbert Miller Testamentary Credit Shelter Trust*, 13 Wn. App.2d 99, 108, 462 P.3d 878 (2020). A cause of action for unjust enrichment begins to run when a party has a right to apply to a court for relief. *Id.*

The Estate argued that the statute began running each time that Elizabeth completed one of the permanent and valuable improvements she had made to the Renata Lane property over the years because it was then that "Robert was enriched." CP 364, ¶ C. However, while

Robert was enriched each such time, he was not *unjustly* enriched. *Unjust* enrichment did not occur until at the earliest in 2017, when Ruth changed her will (CP 632) to cut Elizabeth out, or in 2019 when Ruth died, so that Elizabeth did not get the promised benefit of her labor and monetary expenditures. CP 461.[6] Accordingly, the present lawsuit was brought within three years of the *unjust* enrichment of Robert's Estate.

The Estate, however, argues that Elizabeth could have demanded payment at any time, "much like the holder of a demand note can demand payment at any time." RB 38. This argument is meritless, as there is no evidence the senior Parmans ever agreed to pay for the improvements upon completion of each one or whenever Elizabeth demanded payment. Elizabeth was going to be "repaid" when she inherited 50% of the property.

The Estate also relies on the case of *Dougherty v. Pohlman*,

[6] A promisor breaches an oral contract to make a will on the date of the breach, i.e., the promisor's death, as the promisor could change her will at any time up to the date of her death. *Hagen v. Messer*, 38 Wn. App. 31, 33, 683 P.2d 1140 (1984).

Court of Appeals No. 53746-0-II (filed Jan. 12, 2021) (unpublished) to support its statute of limitations argument, but that case is inapposite because the court there determined that the ex-husband's unjust enrichment cause of action "fully matured" when he completed his work on the house. *Dougherty, slip opn.* at 7. Therefore, the ex-husband had a right, *based upon the agreement of the parties,* to demand the property transfer upon the completion of the construction of the house. Here, the Estate has provided no evidence of any agreement between Elizabeth and the senior Parmans to pay for any specific improvement, other than to will all of them to Shawn and Elizabeth in their wills. Ruth Dep.. ("You're going to have to trust me . . . When Bob and I die, it [the property] will go to you and Shawn . . ." CP 190 at 36; "When Bob and I die, we will will it [Renata Lane property] to you and Shawn." CP 195 at 53; "You and Shawn will be in our will." *Id.*

In addition, the Estate's statute of frauds argument is without merit. RB 42. The doctrines of judicial admission and part performance preclude application of the statute of frauds.

For example, "if the title holder admits, either in his pleadings or his testimony, that he did in fact enter into the contract, the purpose of the statute of frauds is served and the oral agreement will be enforced by the court . . ." *Powers v. Hastings*, 20 Wn. App. 837, 841, 582 P.2d 897 (1978).

Here, Ruth admitted that she promised to transfer 50% of the Renata Lane property to Elizabeth in Ruth's will. Ruth Dep., CP 190 at 35; CP 195 at 53. "A complete admission in court by the party to be charged should dispense with the necessity of any writing whatever." *Powers*, 20 Wn. App. 837, 842.

The doctrine of part performance is also applicable to permit proof of an oral agreement to convey real property if there is sufficient part performance of the agreement. *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995); *Miller v. McCamish*, 78 Wn.2d 821, 826, 479 P.2d 919 (1971). That is a factual issue best reserved for trial.

Accordingly, the trial court did not err in <u>not</u> specifically dismissing Elizabeth's unjust enrichment claim in this case on summary judgment. CP 510-511.

I. The Superior Court Manifestly Abused its Discretion in Awarding Attorney's Fees on the Basis of Frivolousness (RB 44-49).

The Estate cites two cases supporting its claim for attorney's fees in this case based on frivolousness: *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999) (RB 45) and *Hanna v. Margitan*, 193 Wn. App. 596, 613-14, 373 P.3d 300 (2016) (RB 47-48). These cases have no factual similarity with the instant case. What is frivolous in one factual setting is not necessarily frivolous in another.

The connection between unjust enrichment and an equitable lien is obvious: "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, ¶ 15, 191 P.3d 1258 (2008); *Ellenburg v. Larson Fruit Co., Inc.*, 66 Wn. App. 246, 250, 835 P.2d 225 (1992).

An equitable lien may be created by judicial decree in order to do equity under the peculiar circumstances of the case and prevent unjust enrichment. *Restatement of the Law of Restitution* § 16;

Restatement (Third) of the Law of Restitution, Unjust Enrichment § 52; *see also*, *Sorenson v. Pyeatt*, 158 Wn.2d 523, ¶ 9 n. 9, 146 P.3d 1172 (2006). The filing of the notice of lis pendens also protects Elizabeth's claims, as the Estate cannot transfer the property free of Elizabeth's claims in this lawsuit. RCW 4.28.320; *see also* RCW 7.28.260.

These are reasonable arguments supported by caselaw and principles of equity. They are not frivolous.

J. The Superior Court's Factual Findings Are Not Supported by Substantial Evidence, Nor Do They Support the Conclusions of Law (RB 49-56).

RCW 4.84.185 requires the court to make "written findings" that a claim was "frivolous *and* advanced without reasonable cause." [Italics added]. RCW 4.84.185. The written findings here are not supported by substantial evidence, and the findings do not support the superior court's conclusion of law that Elizabeth's claims—in their entirety—were frivolous. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477, 481 (1990); AB 44 – 52.

For example, factual finding No. 10 (CP 711) is conclusory and

circular. Elizabeth's complaint was found to be frivolous and advanced without reasonable cause because "there is no rational argument that can be advanced . . . to support a claim against Robert Parman more than fifteen years after he died." FOF 10. Yet that assertion is manifestly false if the nonclaim statute is inapplicable.

Here, Elizabeth has made reasoned and rational arguments, supported by case law, that at least three exceptions to the nonclaim statute apply. The non-rational argument is the Estate's stubborn insistence that the nonclaim statute is a "blanket, immutable, unforgiving, and unyielding legal rule" with no exceptions. CP 645. The numerous exceptions in the 2020 WSBA's Estate Planning, Probate, and Trust Administration Deskbook demolish that assertion. AB 40 - 43. Yet the superior court's conclusion of frivolousness is ultimately derived from that false assertion.

Elizabeth's stated rationale in bringing the instance case against Robert's Estate was to consolidate the two cases so as to counter the Estate's argument in the companion case that Robert's one-half interest in the community property should be subtracted from

Elizabeth's claim against Ruth in that companion litigation. This is a reasonable basis to bring the instant case, and the superior court made no contrary finding. After all, if the PR can attempt to resurrect Robert's community property interest in the Renata Lane property by disregarding his will and opening an intestate probate of Robert's Estate fifteen years after his death, then it is not unreasonable to challenge that attempt. That is what Elizabeth did here.

K. Other Factors Militate Against Frivolousness (RB 56-59).

1. The Estate asserts that "Washington case law is not inconsistent or unclear," but in the same paragraph asserts that *Runkle* is "inconsistent with controlling authority."[7] RB 57 n. 32. See, AB 54-56. *Runkle* is cited in both Deskbooks, review was denied by the Washington Supreme Court, and the case has never been overruled. Yet the Estate avers without citation of authority that "*Runkle* is not good law anyway." RB 57.[8] If *Runkle* is not good law anyway, and is

[7] *Runkle v. Bank of California*, 26 Wn. App. 769.

[8] The Estate's citation to *Estate of Earls*, 164 Wn. App. 447, 457, 262

supposedly inconsistent with unknown controlling authority, but has never been overruled, and is still cited in the WSBA Deskbooks, there must be a lack of clarity somewhere in this area of the law.[9]

2. The Estate argued that "it's time to adjudicate Robert's estate first before we get to trial on Ruth's estate." VRP (Oct. 22, 2021) 18-19. In other words, the Estate was attempting to gain an advantage in the trial of the companion case by claiming certain assets should be attributed to Robert's Estate rather than to Ruth's Estate. Elizabeth tried to have both cases consolidated to avoid this legerdemain (*id.* at 19), but the court dismissed the motion because "there is nothing to consolidate the older [2018] case with. *Id.* at 23. Attempting consolidation to have all claims decided in one lawsuit constitutes a reasonable cause under RCW 4.84.185 to bring the

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P.3d 832 (2011) suggests that *Earls* made the inconsistency pronouncement. Elizabeth pointed this out in her brief (AB 56) and in argument to the trial court. CP 578 n. 1.

[9] This begs the question of what is the "controlling authority." *Runkle* was decided in Division I. *Earles* was also decided in Division I. The Estate does not reveal which supreme court opinion is the "controlling authority" on this issue.

lawsuit against Robert's Estate.

L. This Court Should Not Award Attorney's Fees to the Estate (RB 59-61).

An appeal is not frivolous if an appellant can cite a reasonably applicable case in support of her argument. *Schreiner v. City of Spokane*, 74 Wn. App. 617, 625, 874 P.2d 883 (1994); *Van Dinter v. City of Kennewick*, 64 Wn. App. 930, 937, 827 P.2d 329 (1992), *aff'd*, 121 Wn.2d 38, 846 P.2d 522 (1993). *Runkle* is such a case. The supreme court denied review, and the case was never overruled. It is therefore "reasonably applicable" to support Elizabeth's argument here. There are many other such cases. *See*, plaintiff's table of authorities.

The trial court did not award attorney's fees to the Estate under RCW 11.96A.150(1)(a), but only under RCW 4.84.185. CP 667. This court should not award attorney's fees under RCW 11.96A.150 either, as no compelling equitable basis for doing so has been demonstrated by the Estate or accepted by the superior court. Nor did the Estate cross appeal the denial of attorney's fees under RCW 11.96A.150(1)(a).

In *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980) the court set forth a number of factors to be considered in determining whether an appeal is frivolous. A quotation from that case is set forth in App. C. All those factors are applicable here.

"We resolve all doubts against finding an appeal frivolous." *In re Settlement/Guardianship of Agm*, 154 Wn. App. 58, 223 P.3d 1276 (2010) (quoting *Delany v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475, *review denied*, 131 Wn.2d 1026, 937 P.2d 1101 (1997)).

"An appeal is frivolous and an award of attorney fees may be appropriate when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision." *Agm*, 154 Wn. App. 58, ¶ 57 (citing *Matheson v. Gregoire*, 139 Wn. App. 624, 639, 161 P.3d 486 (2007)); *Samra v. Singh*, 15 Wn. App.2d 823, 840, 479 P.3d 713 (2020). The instant appeal certainly involves such debatable issues. It is therefore not frivolous, and the Estate should not be awarded

attorney's fees for the appeal.

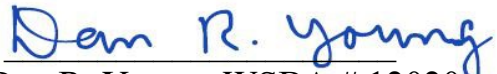
III. CONCLUSION

This Court should reverse the superior court's dismissal of appellant's lawsuit against the Estate, vacate the award of attorney's fees in favor of the Estate, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 18th day of August, 2022.

I certify that this document contains 5,990 words, in compliance with RAP 18.17(b).

Law Offices of Dan R. Young

By 
Dan R. Young, WSBA # 12020
Attorney for Appellant Elizabeth Bartlett

APPENDIX A

4 *Pomeroy's Equity Jurisprudence* (4th ed.) § 1233 at 692 is paraphrased as follows:

> An equitable lien is the right to have property subjected in a court of equity to the payment of a claim. . . . It is neither a debt nor a right of property but a remedy for a debt. It is simply a *right of a special nature* over the property which constitutes a *charge or incumbrance* thereon, so that the *very property itself* may be proceeded against in an equitable action and either sold or sequestered under a judicial decree and its proceeds in one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists.

(Citations omitted.) (Italics added.) *Monegan,* 16 Wn. App. 280, 287-88.

APPENDIX B

RCW 11.40.135 was enacted in 1997. Laws 1997 ch. 252 § 20. Its one sentence reads as follows: "If a creditor's claim is secured by any property of the decedent, this chapter does not affect the right of a creditor to realize on the creditor's security, whether or not the creditor presented the claim in the manner provided in RCW 11.40.070."

APPENDIX C

Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980):

> In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. See Jordan, *Imposition of Terms and Compensatory Damages in Frivolous Appeals*, Wash.State Bar News, May 1980, at 46.

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August 18, 2022 - 1:36 AM

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